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私法拟制论：概念、源流与原因

On the Legal Fiction of Private Law: Its Concept, History,
and Cause

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内容摘要

本文以“私法拟制”为研究对象，采取了概念分析、历史考察以及哲学慎思之方法，力求对私法拟制之概念、源流与原因进行理论性探究，并在此基础上得出关于私法拟制解释的原则性结论。

在导论部分，主要介绍了本文的选题原因、国内外学者关于拟制的研究成果、本文所欲实现的研究目标以及本文意欲采纳的研究方法。就基本立场而言，尽管本文采取了法理学式的研究范式，但本文特别强调将“私法拟制”作为一个私法范畴内的有机概念予以理解。

第一章是关于私法拟制概念的探究。在这一部分中，首先对作为私法拟制概念构成的两大要素，即“私法范畴”与“法律拟制”作了基础性研究，然后在这两大概念的基础上诠释了私法拟制。由此，私法拟制概念大致可以理解为“以私法为范畴的，基于类推思维遮蔽不同要件事实之间的现实差异性，而令不同要件事实得以共享私法效果的规范上事实”。

第二章是关于私法拟制源流的考察。在这一部分中，本文择取罗马法、普通法与欧陆法中的典型私法拟制作为研究对象，提炼性地考察了罗马法、普通法以及欧陆法中私法拟制的精神，指出罗马法中的私法拟制蕴含着对自然法的尊重，并且在方法论中，罗马法私法拟制主要运用地方论与决疑术思维实现；普通法中的私法拟制则蕴含着外部法律形式主义与法律实用主义两种态度的一种融合；欧陆法中的私法拟制则存在着既承认私法拟制，又对其极尽限制的复杂态度，其主要体现为教义拟制的技术性运用。

第三章所研究的内容是私法拟制在哲学层面上的原因。在这一部分中，本文择取“理性主义存在论——诠释学”与“经验主义怀疑论——拟制哲学”两条路径对私法拟制的原因作出探究。相较而言，前者关于私法拟制原因的解释尽管并不完备，但具有可操作性；而后者关于私法拟制原因的解释尽管彻底，但较为激进，而在可接受性方面存在劣势。

在结论部分，本文辨析了私法拟制的虚假性与真实性之双重特性，并提出了关于私法拟制解释的三大原则，即回归原则、限制原则以及体系原则。

关键词：私法；法律拟制；私法拟制

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ABSTRACT

The subject of this paper is “legal fiction of private law”, which is concentrated on its concept, history in Roman law, common law and continental law, and the philosophical cause. In terms of research approaches and research objectives, the paper aims at the theoretical inquiry about the analysis of concept, the study of history, and the philosophical cause on legal fiction of private law by the research methods of analysis of concept, study of history, and philosophical thinking. At last, based on these research, gets the conclusion on the interpreting principles on legal fiction of private law.

In the part of introduction, the content is about the reasons why the author chooses this topic, current research results, research goals, and research methods. From the standpoint of this paper, although it pays important attention on the research methods of jurisprudence, the legal fiction of private law is regarded as a concept of private law.

In what follows, Chapter one focuses on the concept of legal fiction of private law. Legal fiction of private law is composed of “private law” and “legal fiction”, so this part aims at researching the category of private law and the definition of legal fiction, and based on these research, we can draw a conclusion that the concept of legal fiction of private law is an organic concept consists of private law and legal fiction.

Chapter two focuses on the history of legal fiction of private law. Legal fictions of private law are abundant in Roman law, common law, and continental law. In Roman law, the legal fiction of private law contains these factors of natural law, topic science, and rhetoric; in common law, the legal fiction of private law is an attitude composed of external legal formalism and legal pragmatism; in continental law, the legal fiction of private law is considered as an inevitable thing that is annoying.

Chapter three focuses on the philosophical cause on legal fiction of private law. From the way of “ontology of rationalism/ hermeneutics” and “skepticism of empiricism/philosophy of as if”, we can explain the philosophical cause on legal fiction of private law. Of course, the former perhaps is better, but the latter is more

complete and radical.

In conclusion, this part investigates the nature of “reality” and “fiction” in legal fiction of private law at last, and focus on the interpreting principles of legal fiction of private law which is the principle of return, the principle of limit, and the principle of system.

Key words: Private law; Legal fiction; Legal fiction of private law

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